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# ENVIRONMENTAL ASSESSMENT BOARD

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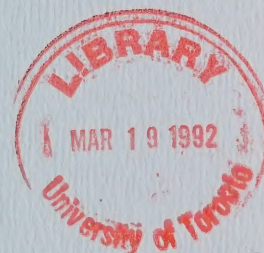
VOLUME: 363

DATE: Tuesday, March 10, 1992

BEFORE:

A. KOVEN Chairman

E. MARTEL Member



FOR HEARING UPDATES CALL (COLLECT CALLS ACCEPTED) (416)963-1249

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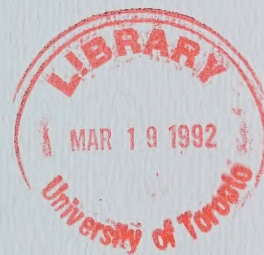
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2300 Yonge St., Suite 709, Toronto, Canada M4P 1E4







HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL  
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR  
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental  
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental  
Assessment for Timber Management on Crown  
Lands in Ontario;

- and -

IN THE MATTER of a Notice by The Honourable  
Jim Bradley, Minister of the Environment,  
requiring the Environmental Assessment  
Board to hold a hearing with respect to a  
Class Environmental Assessment (No.  
NR-AA-30) of an undertaking by the Ministry  
of Natural Resources for the activity of  
Timber Management on Crown Lands in  
Ontario.

-----  
Hearing held at the offices of the Ontario  
Highway Transport Board, Britannica Building,  
151 Bloor Street West, 10th Floor, Toronto,  
Ontario, on Tuesday, March 10th, 1992,  
commencing at 1:30 p.m.


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VOLUME 363

BEFORE:

MRS. ANNE KOVEN  
MR. ELIE MARTEL

Chairman  
Member





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MR. V. FREIDIN, Q.C.	)	MINISTRY OF NATURAL
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MS. K. MURPHY	)	
MR. B. CAMPBELL	)	
MS. J. SEABORN	)	MINISTRY OF ENVIRONMENT
MS. N. GILLESPIE	)	
MR. R. TUER, Q.C.	)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN	)	ASSOCIATION and ONTARIO
MS. E. CRONK	)	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY	)	ASSOCIATION
MR. D. HUNT	)	
MR. R. BERAM		ENVIRONMENTAL ASSESSMENT BOARD
MR. J.E. HANNA	)	ONTARIO FEDERATION
DR. T. QUINNEY	)	OF ANGLERS & HUNTERS
MR. D. O'LEARY		
MR. D. HUNTER	)	NISHNAWBE-ASKI NATION
MR. M. BAEDER	)	and WINDIGO TRIBAL COUNCIL
MS. M. SWENARCHUK	)	FORESTS FOR TOMORROW
MR. R. LINDGREN	)	
MR. D. COLBORNE	)	GRAND COUNCIL TREATY #3
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MR. F. R. CAPUTO	)	ABORIGINAL ASSOCIATION
MS. M. HALL		KIMBERLY-CLARK OF CANADA LIMITED and SPRUCE FALLS POWER & PAPER COMPANY





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I N D E X   o f   P R O C E E D I N G S

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1 ---Upon commencing at 1:30 p.m.

2 MADAM CHAIR: Good afternoon. Please be  
3 seated.

4 Good afternoon, Mr. Irwin. We haven't  
5 seen you in a few months.

6 MR. IRWIN: Not since Thunder Bay. Mr.  
7 Martel.

8 MADAM CHAIR: That's right, that's right.

9 MR. BERAM: If it please the Board, Madam  
10 Chair, I have one preliminary matter I would just like  
11 to put on the record.

12 Dennis O'Leary, counsel for the  
13 OFAH/NOTOA Coalition, called me earlier and asked me to  
14 relate his party's position on the proceedings that we  
15 are dealing with today. They are as follows:

16 The OFAH/NOTOA Coalition takes no  
17 position on these motions but does not want to be taken  
18 as having adopted any particular position.

19 They have nothing to say with respect to  
20 the OMAA motion seeking an order to cross-examine Mr.  
21 Jacobsen on his Affidavit of March 5th, 1992.

22 And, thirdly, the OFAH/NOTOA Coalition  
23 does, however, support MNR's position to the suggestion  
24 contained in Mr. Irwin's Affidavit of March 9th, and  
25 that is that suggestion that all parties who might be

1 prejudiced by the determination of this motion should  
2 be given notice and that the motion should be heard in  
3 Sudbury.

4 And at this point I'll turn it over to  
5 Mr. Freidin.

6 MR. FREIDIN: Madam Chair, may I assume  
7 that the Board has copies of the Notice of Motion of  
8 the Proponent and the Affidavit of Mr. Jacobsen?

9 MADAM CHAIR: Yes, we do, Mr. Freidin.

10 Before you get started, why don't we just  
11 quickly run through some of the dates of the  
12 documentation that the Board does have for the record  
13 so we set it straight, and I will go through that very,  
14 very quickly.

15 MR. FREIDIN: Sure. It doesn't matter  
16 whether you do it or I do it.

17 MADAM CHAIR: We received the Panel 5  
18 witness statement from the Ontario Metis and Aboriginal  
19 Association, OMAA, and the title of that is: The  
20 Eastern Lake Nipigon Community Native Self-Government  
21 in the Timber Management Sector, Co-Management System  
22 for Natural Resources. We received that on January  
23 10th, 1992.

24 On February 25th, 1992 we received a copy  
25 of a letter from Ms. Murphy on behalf of MNR to Mr.



1 Irwin raising questions about the relevance of the  
2 Panel 5 evidence.

3 Following that -- well, a letter dated -  
4 a response from Mr. Irwin to Ms. Murphy dated the same  
5 day February 25th, 1992.

6 Following that we have various pieces of  
7 correspondence from March the 2nd to March the 4th,  
8 with respect to issues that would be involved in  
9 scoping the Panel 5 evidence. The Board had thought it  
10 might do so by mail rather than bringing Mr. Irwin down  
11 from Sault Ste. Marie.

12 The interrogatories from Mr. Irwin  
13 arrived, I believe, on March 6th, 1992.

14 And we received a copy of a Motion from  
15 the Ministry of Natural Resources dated March 5th,  
16 1992, and after that we received a Motion from --

17 MR. FREIDIN: That would have been  
18 accompanied by the Affidavit of Mr. Jacobsen.

19 MADAM CHAIR: That's right, Mr. Freidin.

20 And on March 10th we received a Motion  
21 from Mr. Irwin, and we have received correspondence  
22 from at least two parties, including Forests for  
23 Tomorrow and Grand Council Treaty No. 3, with respect  
24 to adjourning a discussion of this motion to some  
25 future date.

1                   And those are all the bits and pieces of  
2           paper that the Board has.

3                   MR. FREIDIN: There's one other sequence  
4           of material that I think you should have, and that is  
5           an Affidavit of Mr. Irwin.

6                   MADAM CHAIR: Yes, on March the 9th,  
7           1992.

8                   MR. FREIDIN: Sworn March 9th.

9                   MADAM CHAIR: That's right.

10                  MR. FREIDIN: So I think we have all got  
11       the same paper.

12                  As you will see, Madam Chair, I can  
13       advise you at the beginning that there has been a  
14       request for an adjournment and the Proponent is  
15       consenting to that adjournment, and that really gives  
16       rise to the question as to whether there's anything  
17       useful we can accomplish here today.

18                  It's my submission that there are a  
19       number of things that we can usefully accomplish here  
20       today, and the first matter - and I'll just list them  
21       and then I'll go back and explain very briefly why I  
22       think it would be helpful to deal with these - the  
23       first one will be to ask for clarification from OMAA as  
24       to what specific relief they are seeking as a result of  
25       the evidence contained in witness Panel No. 5.

1                   You'll see that that, in fact, is the  
2                   very first issue which we address in our Notice of  
3                   Motion where it states in subparagraph (a):

4                   "Does the Ontario Metis and Aboriginal  
5                   Association ask this Board to order,  
6                   recommend or endorse the specific  
7                   proposal contained in the witness  
8                   statement for Panel 5 which it  
9                   submitted?"

10                  And I will be making some submissions  
11                  later as to why it's important to have that  
12                  clarification now.

13                  In a nutshell, Madam Chair, it may very  
14                  well be that what they say they are seeking is  
15                  something which does not give rise to a concern  
16                  regarding the effect on the 1850 negotiation and, if  
17                  that's the case, it might very well be that the  
18                  Ministry would say: Let the evidence go in and let's  
19                  deal with this matter in terms of the legal  
20                  implications of it at the end of the case. I'll come  
21                  back to that.

22                  Because we are agreeing to an  
23                  adjournment, three issues or questions arise that could  
24                  be dealt with today. No. 1, to what date will the  
25                  matter be adjourned. In other words, if in fact there



1 is a substantive issue to be argued after we have  
2 clarification from OMAA as to what specific relief they  
3 are seeking, when should that particular motion be  
4 heard.

5 Secondly, there is the question as to  
6 whether or not it is appropriate for the Board to order  
7 that Mr. Jacobsen be made available for the purpose of  
8 being cross-examined on his Affidavit.

9 And, thirdly, in the Affidavit of Mr.  
10 Irwin of March the 9th there is a suggestion, as I read  
11 the document, that there be some wider or further  
12 notice given of this particular motion and that the  
13 matter perhaps be argued in another place; i.e., in  
14 Sudbury.

15 Now, those are the things which I would  
16 like to address. Unless there are some objections to  
17 proceeding in that particular fashion, Madam Chair, I  
18 would ask for leave that I be allowed to address each  
19 of those items in the order that I've set them out, and  
20 then the other parties can respond.

21 MADAM CHAIR: Are there any objections to  
22 Mr. Freidin's suggestion?

23 Mr. Irwin?

24 MR. IRWIN: Objections to his questions?

25 MADAM CHAIR: No, objections to the fact

1       that MNR will consent to an adjournment on the motions,  
2       but we have before the list of questions that Mr.  
3       Freidin feels it would be useful to discuss today.

4               MR. IRWIN: We are prepared to address it  
5       if the Board sees fit. We get the impression that Mr.  
6       Freidin thinks he's the Board, that he wants us to  
7       respond if -- I mean, our documents speak for  
8       themselves in much the sense that the Northshore model  
9       speaks for itself, or the Treaty 9 model speaks for  
10      itself. These questions addressed to us were not  
11      addressed to the Northshore group.

12             As a matter of fact we have a letter, we  
13      showed it to Mr. Freidin, that he's agreeable to their  
14      evidence going in and, you know, if the Board asks us  
15      to address what he's discussing we will. We just feel  
16      that what he is asking is more appropriate -- is  
17      actually a decision of the Board and not -- it's what  
18      the Board has -- he's talking about weight of evidence.  
19      This is the Board's jurisdiction, not MNR's, but we  
20      will respond to it.

21             MADAM CHAIR: Thank you, Mr. Irwin.

22             To start with, there is a matter that  
23      concerns the Board greatly and that would have been on  
24      our list of questions to you for scoping and we would  
25      have taken it up at the scoping session, but one wasn't

1       held, and that is the first matter that, in fact, Mr.  
2       Freidin has identified; and, that is, the Board wants  
3       to know what OMAA wants from the Board with respect to  
4       the Panel 5 evidence, and we want to discuss very fully  
5       today with you, Mr. Irwin, what it is that is in the  
6       Panel 5 evidence and what you would expect the Board to  
7       do with that.

8                   And, again, this is in the form of a  
9       scoping question from the Board because we want to know  
10      that.

11                   MR. FREIDIN:  Madam Chair, I was  
12      wondering before -- that's what I'm going to want from  
13      Mr. Irwin.  I would like to just give you a little bit  
14      of background to indicate why there is confusion, if  
15      you think it would be helpful, as to what it is they  
16      are seeking.

17                   MADAM CHAIR:  Whose confusion, Mr.  
18      Freidin?

19                   MR. FREIDIN:  The Proponent's confusion,  
20      and obviously perhaps yours because you've asked  
21      specifically what are they asking for.

22                   MR. MARTEL:  That's simply because we  
23      want to know clearly.

24                   MR. FREIDIN:  It may be that --

25                   MADAM CHAIR:  Do you think it would be



1 helpful before Mr. Irwin begins?

2 MR. FREIDIN: Yes, I think it might be,  
3 and it will be very brief, I can't see it taking more  
4 than about five minutes, if that, for me to highlight  
5 this. You'll see that the question --

6 MADAM CHAIR: Go ahead, Mr. Freidin.

7 MR. FREIDIN: The question was posed by  
8 the Ministry in terms of interrogatories, and the first  
9 question was:

10 "Does OMAA ask the Environmental  
11 Assessment Board to order, recommend or  
12 endorse the proposal for the specific  
13 co-management area and structure  
14 described in this witness statement?"

15 Now, in the answer OMAA has said, and  
16 they've repeated that this, as recently as this  
17 morning, that this is still their answer to that  
18 question, they say that OMAA expects -- this is in the  
19 answers to interrogatories.

20 MR. MARTEL: Which number is it, Mr.  
21 Freidin?

22 MR. FREIDIN: This would be Interrogatory  
23 No. 1.

24 MR. MARTEL: Okay. Just a second.

25 MR. BERAM: If I may add, Mr. Martel,

1       it's behind Tab 3 of the material.

2                   MR. MARTEL: Thank you.

3                   MR. BERAM: Third page in.

4                   MR. MARTIN: Okay.

5                   MR. FREIDIN: You see that the answer, as  
6       it reads now, says:

7                   "OMAA expects the Environmental  
8                   Assessment Board to review the models put  
9                   forth by OMAA and the Eastern lake  
10                  Nipigon Community and the draft terms and  
11                  conditions submitted by the Ministry of  
12                  Natural Resources dated January the 6th,  
13                  1992...", and then it says:

14                  "...and to devise a system that meets the  
15                  standards set out in the Supreme Court  
16                  Sparrow decision."

17                  And then they set out in the first two  
18       items what the onus would be on the Aboriginal peoples  
19       and, if a certain test was met, what onus would then be  
20       shifted to the Crown.

21                  Now, the Ministry is in some doubt as to  
22       what is meant by asking the Board to devise a system  
23       that meets these particular standards.

24                  The Ministry looked at OMAA Panel No. 5,  
25       and if one reviews that it can be interpreted as a

1 request of the Board that the Board order that that  
2 specific management proposal be implemented for that  
3 specific area.

4 It is that possible interpretation which  
5 gives rise to the concern which is described in Mr.  
6 Jacobsen's Affidavit, the concern of those people  
7 involved in the 1850 negotiations, who are presently  
8 engaged in negotiations about that very land area in  
9 relation to resources in that very land area and,  
10 therefore, some clarification is required as to whether  
11 in fact OMAA are asking this Board to make a specific  
12 order that a specific proposal, model or co-management  
13 agreement be in fact implemented in that area.

14 To be quite frank, the people in the 1850  
15 situation would probably be sitting there wondering  
16 whether they're in the right place, maybe they should  
17 be here or somewhere else. Now --

18 MR. IRWIN: I have an objection on the  
19 record. My learned friend said he came here to consent  
20 to an adjournment, but that we will deal with the issue  
21 of cross-examining Mr. Jacobsen.

22 He now is going back to Mr. Jacobsen's  
23 evidence. I mean, he's got to decide whether he's  
24 going to fight the adjournment or whether he's going to  
25 go on. Now, what he wants to do -- he's saying, we're



1 quite agreeable to an adjournment. I don't know really  
2 where we're going today. Now, he's referring to --

3 MADAM CHAIR: Thank you, Mr. Irwin.

4 Mr. Freidin, the Board asked you to give  
5 some background with respect to the answer to the  
6 question we want Mr. Irwin to give us.

7 MR. FREIDIN: One last thing then, a  
8 letter from Mr. Reid, counsel for OMAA.

9 MADAM CHAIR: Is this the August 20th,  
10 1991 letter, Mr. Freidin?

11 MR. FREIDIN: August 20th.

12 MADAM CHAIR: Yes.

13 MR. FREIDIN: August 20.

14 MADAM CHAIR: Yes.

15 MR. FREIDIN: (handed)

16 MR. MARTEL: Thank you.

17 MR. FREIDIN: Now, this letter which was  
18 addressed to the Board - and I'm not sure whether it  
19 has been marked as an exhibit, perhaps it should be if  
20 it hasn't - but this witness statement does give an  
21 indication what the purpose of Panel 5 is all about.

22 And I can tell you that if the purpose of  
23 Panel 5 is as it is described in this letter it is  
24 something different than a specific request that you  
25 impose a co-management agreement for a specific area.

1                   If the purpose of Panel No. 5 is as  
2       stated in this letter and OMAA were to so state, the  
3       problem or the concern about the 1850 negotiations  
4       would disappear.

5                   This letter is different in that it  
6       indicates that:

7                   "It is our position that the EA Board  
8       should order MNR to enter into structured  
9       negotiations with our peoples on the  
10      implementation of our right of  
11      self-government over our traditional  
12      lands. Models and structures of  
13      co-management and community-based  
14      forestry would be developed in those  
15      negotiations. There is, therefore, no  
16      need to present a single model to the  
17      Board as the preferred form of  
18      community-based forestry, we only need to  
19      present some possible forms which might  
20      emerge from negotiations between our  
21      peoples and the government."

22                  And I stress:

23                  "...the models and structures of  
24      co-management would be developed in those  
25      negotiations."

1                   If that's the position of OMAA, we want  
2           clarification on this, but I'm telling you now, if  
3           that's what they're asking for, that would  
4           satisfactorily address the concern of the 1850 people  
5           and we would withdraw our motion, we would not object  
6           to the evidence going in --

7                   MADAM CHAIR: Just as you do not object  
8           to the Panel 4 evidence?

9                   MR. FREIDIN: That's right, until such  
10          time as -- and we would still, of course, reserve the  
11          right to argue at the end of the case what the  
12          relevancy of that evidence is and whether, in fact, the  
13          Board has the power to order those specific  
14          negotiations. That's the background.

15                  MADAM CHAIR: And the Board is willing to  
16          listen to those arguments, as we have told Mr. Colborne  
17          throughout this entire hearing.

18                  MR. FREIDIN: That's correct. And we, as  
19          you know, we have made it, I think fairly clear, that  
20          we have a difference of opinion with Mr. Colborne  
21          regarding what the Board can do with that evidence.

22                  The problem is, the real life situation  
23          up to very recently was such that taking that position,  
24          not raising the legal argument at that stage, didn't  
25          cause any inconvenience or problem for anybody, but



1 it's because of the real life situation which now faces  
2 us and, that is, a perception of prejudice to a  
3 negotiation which is ongoing outside this particular  
4 Board's area and they say -- and Mr. Jacobsen's  
5 Affidavit is put forward to say, if in fact the Board  
6 is going to entertain this thing and leave that issue  
7 and that legal issue until the end, the people who are  
8 involved in the 1850 negotiation are going to be  
9 sitting there for a long period of time perhaps  
10 wondering and worrying about whether they're just  
11 spinning their wheels. And that's why we want the  
12 clarification.

13 It may very well be that OMAA say: No,  
14 no, this is wrong, this is what we're asking for and  
15 they make it very clear what they are asking for. And  
16 we may say: Well then, unfortunately it may be an  
17 issue which we have to deal with as a matter of law now  
18 and we can't leave to the end because to leave that  
19 outstanding issue of law out there until the end of the  
20 case may cause problems for these other negotiations.  
21 And that's as simple as that.

22 MADAM CHAIR: Thank you, Mr. Freidin.

23 Mr. Irwin, have you read the letter of  
24 August 20th which Mr. Reid sent to the Board?

25 MR. IRWIN: Yes I have, just now.

1 MADAM CHAIR: Oh, just now.

2 MR. IRWIN: Yes.

3 MADAM CHAIR: Do you need a few minutes  
4 to go through that letter in more detail?

5 The Board understands very clearly what  
6 Mr. Freidin has put to us because we had looked up this  
7 letter ourselves. We have been operating under the  
8 assumption that what Panel 5 would be is what it is  
9 described as being on August the 20th, 1991.

10 MR. IRWIN: Which is a possible model.

11 MR. MARTEL: Yes.

12 MR. IRWIN: That's all.

13 MADAM CHAIR: But would you like some  
14 time -- Mr. Freidin has said that the Ministry will  
15 withdraw its motion.

16 Would you like a few minutes to go  
17 through this letter and understand very clearly and  
18 tell the Board whether this is still your position or  
19 not?

20 MR. IRWIN: I think I understand the  
21 letter and I would like to read it in conjunction with  
22 the funding order, if I may.

23 But I think there's a deeper issue here.  
24 The issue - we're skirting around it - is: Does this  
25 Board have jurisdiction to deal with aboriginal rights,

1 and that is the issue. Does it have, does it have  
2 jurisdiction to deal with aboriginal rights. If it  
3 does that -- aboriginals are Metis, Indian and Inuit.  
4 The only way a person can become an Indian under the  
5 Indian Act by gaining status.

6 I'm saying that we will deal with 1850  
7 and these six groups that effectively excludes the  
8 Metis from the process. I don't think that's what the  
9 Constitution says.

10 The bottom line is: Does this Board have  
11 jurisdiction to deal with aboriginal rights. Whether  
12 by advising some sort of scheme to the Minister or  
13 specifically setting out a procedures, whatever, the  
14 Board, at the end of this three-year process, might  
15 conclude.

16 Now, MNR's position is: No, you don't.  
17 Our position is: What are we here for. Certainly you  
18 do.

19 MADAM CHAIR: If that's going to be your  
20 position, Mr. Irwin, then I guess it's a apparent to  
21 all of us we are going to have to hear argument on  
22 that.

23 And is that what you're saying you mean  
24 by your Panel 5 evidence? You're saying that you would  
25 ask the Board to order the Ontario Government to

1       implement the draft agreements in your Panel 5?

2                   MR. IRWIN: No, no. No, no. No more,  
3       for instance at page 72 of the Nishnawbe-Aski Nation  
4       proposal it deals with matters much broader than ours  
5       and it even goes into social issues, it has the court  
6       system and so on. We withdrew social issues because we  
7       kept ours strictly to natural resources and timber  
8       management.

9                   MR. MARTEL: Can I ask you, I don't think  
10      that they said in there - and I'm just going by  
11      memory - I don't think land masses or ordering them to  
12      self-government or to be self-government is part of  
13      the -- they're part of a planning process, as I  
14      understand it. In the agreement that was reached  
15      between NAN, the OFIA and the Ministry it was a  
16      planning process essentially, unless I misread it, and  
17      it is not -- I can't see where it goes as far as what's  
18      being asked in your Panel 5, which seems to direct the  
19      Board to do something specifically.

20                  MR. BERAM: I wonder if I can interrupt  
21      for just a moment, but the response thus far from Mr.  
22      Irwin to the Board's question seems to be raising a  
23      very substantive legal issue and Mr. Freidin has  
24      indicated he's willing to agree to adjourn.

25                  I wonder if we could perhaps get back to



1 the question that the Board has placed before the  
2 parties, that being, this may be essentially special to  
3 what it is that OMAA asks for in the context of this  
4 Panel 5.

5 MR. IRWIN: I will be addressing that if  
6 I can be allowed to finish.

7 MR. BERAM: I apologize for the  
8 interruption.

9 MR. IRWIN: I think you're absolutely  
10 correct, there's a legal issue that has to be  
11 addressed.

12 The other statement was witness statement  
13 No. 1 Norwatch/Northshore Tribal Council. Section 19  
14 of theirs which you'll be hearing in April is very  
15 similar to what we have, only in broader terms. It  
16 talks about the political/legal status for aboriginal  
17 right under the First Nations, the Ministry of Natural  
18 Resources has a Crown responsibility, it talks about  
19 Sparrow, it talks about the Supreme Court of Canada, it  
20 talks about almost the same cases, it talks about  
21 co-management.

22 Now, we don't put this forward as a  
23 specific model. We say -- we don't ask the Board that  
24 you must order this or this for this particular area.  
25 We thought the Board was interested because the Board's

1 mandate was so broad.

2 Taking a particular area and see how it  
3 would look, you know, it could -- this could work  
4 anywhere. The Moose River area, this model up there  
5 could work anywhere. We're not asking that it be  
6 designated this area, we just took this area because  
7 that's where most of the evidence was being gathered at  
8 the time.

9 And back when the money was given by the  
10 EAB on July 23rd, 1991 to OMAA, just drawing from the  
11 funding order:

12 "In its application OMAA advised that  
13 most of the funding has been spent to  
14 date in developing a consensus among the  
15 OMAA communities on its proposals for  
16 a timber management policy and assembling  
17 data regarding the Beardmore/Macdiarmid  
18 for aboriginal communities in the Eastern  
19 Lake Nipigon area and the potential  
20 effects of timber management policies  
21 upon it."

22 Further on:

23 "The Beardmore/Macdiarmid Community  
24 Co-pilot to be used as a basis for OMAA's  
25 case on community-based integrated

1 resource management."

2 That's what we're talking about.

3 "OMAA has filed four witness statements  
4 with the Board. These are entitled:  
5 Overview of OMAA and Its Constituents,  
6 The Impacts of MNR's Timber Management  
7 Policies on the Aboriginal People of  
8 Eastern Lake Nipigon, The Relationship  
9 Between Aboriginal and Treaty Rights of  
10 OMAA's People, and Environmental  
11 Assessments in Ontario and Building a  
12 Partnership for Resource Management and  
13 Development" And so on.

14 And the finding of the Board then was  
15 that:

16 "The panel believes that OMAA proposes to  
17 present evidence that will assist the  
18 Board."

19 That's all this is. We don't ask you to  
20 specifically order this model for that area. We  
21 present it only in the sense that this is evidence that  
22 may assist the Board, if the Board finds that it has  
23 the power to deal with aboriginal rights. If it  
24 doesn't, that's the end of the case. I'm taking --

25 MADAM CHAIR: Well, it just wouldn't be

1       useful to get into that argument, I mean, obviously we  
2       will have to look at that at some other date.

3               As you've pointed out, the Board has  
4       taken a very broad view of the type of evidence that it  
5       should look at in this situation.

6               MR. IRWIN: Right.

7               MADAM CHAIR: And we have encouraged  
8       parties to give us evidence with respect to the  
9       definition of the environment under the Environmental  
10      Assessment Act which includes the socio-economic  
11      aspects, we have listened to evidence from Professor  
12      Brad Morse, which we found informative with respect to  
13      historical developments in Canadian legislation with  
14      respect to aboriginal matters, and we have received all  
15      that evidence with a view that it will educate and  
16      inform us about many, many matters.

17              When we look at the Panel 5 evidence, we  
18      see very brief mention of timber management, which is  
19      what we have got to make a decision about in this  
20      application.

21              The so-called models and draft agreements  
22      have to do with a wide variety of matters, including  
23      wildlife management and enforcement and general land  
24      use policies and mineral development and so forth that,  
25      quite frankly, it's quite a stretch to, I think,



1 persuade anyone that this Board has authority over  
2 those matters.

3 MR. IRWIN: Well, fine. I don't argue  
4 with that. You may want to restrict what you think you  
5 have authority over. You could take some service  
6 rights out, for instance. I don't know if you want  
7 to -- we talk about insecticides and we talk about  
8 enforcement - I think that fits into timber management  
9 management.

10 I'd say that at least 50 per cent of what  
11 we put in there implies directly to timber management  
12 from enforcement, to front-ending, to monitoring, to  
13 providing scientists for native groups and so on.

14 But that doesn't come away from the  
15 central argument. If you restrict what you're going to  
16 deal with in the sector, then the argument that MNR  
17 has, you don't have the right to deal with aboriginal  
18 claims or aboriginal rights, now we say the Board does.

19 MR. FREIDIN: Madam Chair, could I have a  
20 moment to consult with Mr. Jacobsen. It might be,  
21 based on what Mr. Irwin has said, the problem has just  
22 disappeared.

23 MADAM CHAIR: Do you want a five or  
24 10-minute recess, Mr. Freidin?

25 MR. FREIDIN: Five minutes.

1 MADAM CHAIR: Five minutes. Okay.

2 ---Recess taken at 2:05 p.m.

3 ---On resuming at 2:10 p.m.

4 MADAM CHAIR: Mr. Freidin.

5 MR. FREIDIN: Madam Chair, I think - not  
6 I think - I can happily report that as a result of the  
7 comments made by Mr. Irwin the concern regarding the  
8 presentation of the Panel 5 evidence and, for that  
9 matter the Panel 4 evidence, Madam Chair, which is  
10 similar in nature, dissipates. We assume that the same  
11 comments apply to the Panel 4 evidence as well.

12 And that, on that basis, we can withdraw  
13 the motion and we can all look forward to hearing  
14 OMAA's evidence as scheduled. And I have spoken to  
15 other counsel and it is clearly understood by all that  
16 the Ministry reserves the right that it has always  
17 indicated that it did and, that is, to argue at the end  
18 of the case what powers the Board has to deal with  
19 aboriginal and Treaty rights and to order any specific  
20 type of co-management agreement, et cetera.

21 MADAM CHAIR: Is that satisfactory to  
22 you, Mr. Irwin?

23 MR. IRWIN: Well, Mrs. Koven, I don't  
24 know if I should say this tongue and cheek, but we have  
25 done about 30 hours each preparation for today. I

1 think the Ministry should pay us our costs thrown away  
2 on a solicitor/client basis.

3 MADAM CHAIR: Well, unfortunately, Mr.  
4 Irwin, we're the last Board on the face of this  
5 province who doesn't have the power to award costs.

6 MR. IRWIN: Well --

7 MR. FREIDIN: Madam Chair, while we're  
8 all -- I'm sorry.

9 MADAM CHAIR: Before you continue, or  
10 before we conclude today, we do want to talk a bit  
11 about which witnesses will be coming to testify to the  
12 evidence of Panel 5 and sort out a few other matters  
13 about hearing that evidence.

14 MR. IRWIN: I filed for the MOE a list of  
15 witnesses.

16 MADAM CHAIR: And we have that. We just  
17 wanted to go through that with you to see what they  
18 will be saying.

19 MR. FREIDIN: Did I get a copy of that?

20 MADAM CHAIR: Mr. Freidin, did you want  
21 to say something else before we get into the logistics  
22 of the Panel 5 evidence?

23 MR. FREIDIN: No, it was that that I was  
24 going to raise. There was some indication there were  
25 going to be three panels and I wanted to some

1 clarification of that. It sounds like what we're going  
2 to be talking about here.

3 MADAM CHAIR: All right. Who will be the  
4 witnesses in Panel 4, Mr. Irwin? I've got three names  
5 on my copy and I don't know who to expect. I was told  
6 that it would be Henry Wetelainen, Louis Ainsley and  
7 I've got a question mark besides Professor Dunster.

8 MR. IRWIN: As you may recall, Mrs.  
9 Koven, I came into this late and I had some of these  
10 witnesses give evidence in Panels 1, 2 and 3 in Thunder  
11 Bay. Mr. Wetelainen, I remember some of my experts  
12 wouldn't show up because they were retained by a former  
13 council and tried to put that behind me.

14 I would like to merge 4 and 5. 4 and 5  
15 is much of the traditional evidence that this Board has  
16 heard over and over again, the damages being done and  
17 so on. I would rather get that over quickly and deal  
18 with Panel 5 which I think is the more interesting  
19 panel.

20 Mr. Aiken is retired Assistant Deputy  
21 Minister, one time Acting Deputy Minister of Northern  
22 Development. I think his evidence is very good because  
23 he's looked at all of the different agreements across  
24 Canada and basically did a cut and paste operation on  
25 that model, that's what it is. Many of those phrases



1       you'll find familiar because they're borrowed from  
2       existing Treaties.

3                       I will lead with him and with Mr.  
4       Dolcetti who is the planner. I think the substance of  
5       that panel will be Mr. Aiken.

6                       The next panel, I think the Board will  
7       find interesting too because Mr. Nothing is an expert,  
8       Bill Nothing is an experienced negotiator in the Treaty  
9       areas, he's now helping out OMAA and knows a lot of  
10      detail about modeling. And Mr. Elliott is a Canadian  
11      Ojibway, Anglo/Chippewa working out of the United  
12      States who is quite familiar with the justice system  
13      and the justice modeling. He has held seminars on  
14      modeling. I think those two will be interesting.

15                      MADAM CHAIR: Do either of these  
16      gentlemen know anything about timber management, Mr.  
17      Irwin?

18                      MR. IRWIN: Well, timber management in a  
19      sense that you have to enforce the way we manage our  
20      timber, whether it's allocations or the animals or the  
21      seasons or any number of things. They are certainly  
22      not foresters. Mr. Nothing will probably know more  
23      about the forestry sector than Mr. Elliott.

24                      The last five witnesses in one panel are  
25      very traditional. You've heard three of them already,

1 two is in Mr. Hector King is in witness statement No. 4  
2 and Mr. MacGuire will be here for the first time.

3 MADAM CHAIR: Mr. Michael MacGuire, we've  
4 heard from Mr. Patrick MacGuire.

5 MR. IRWIN: I will put these on as one.  
6 These are mostly your traditional type of evidence that  
7 you usually hear before the Board and what they have  
8 found from meeting with various people in various  
9 sectors on how co-management can work with the  
10 outfitters, with the reeves, with the reserves since  
11 they gave evidence.

12 And it's been difficult, it's been  
13 difficult for people that don't have a lot of  
14 administrative skills to go out and try to become  
15 administrators. Since they gave evidence in Thunder  
16 Bay they have tried to go out and do these things, and  
17 I think their evidence might be interesting in the  
18 sense of: Can they make it work, can they make  
19 co-management work, because obviously that's an  
20 important element. It's okay to say you've got  
21 co-management, but are you able to make it work.

22 MADAM CHAIR: All right. And when you  
23 say Panel 1, 2, 3, do you mean day -- how long is it  
24 going to take you to lead your examination-in-chief?

25 MR. IRWIN: I don't think we are going to

1 be here four days. I would imagine two and a half days  
2 tops.

3 MADAM CHAIR: For your examination or are  
4 you taking into account the cross-examination?

5 MR. IRWIN: I would think  
6 cross-examination and examination, I don't see much --  
7 unless there would be a lot of cross-examination of Mr.  
8 Aiken.

9 MADAM CHAIR: Do you think you can lead  
10 your evidence in a day of all these witnesses, or two  
11 days?

12 MR. IRWIN: Two days.

13 MADAM CHAIR: Two days.

14 MR. IRWIN: Possibly two mornings I can  
15 lead it because most of it is there and  
16 self-explanatory. I can't gauge cross-examination.

17 MADAM CHAIR: What you're saying, Mr.  
18 Irwin, is that you have taken Panel 4--

19 MR. IRWIN: Yes.

20 MADAM CHAIR: --and Panel 5 and we're now  
21 talking about one panel?

22 MR. IRWIN: Right.

23 MADAM CHAIR: We're still getting  
24 confused about what Panels 1, 2 and 3 mean with respect  
25 to the witness statement. You don't mean to say these

1 are separate witness panels?

2 MR. FREIDIN: Separate statements.

3 MADAM CHAIR: Separate statements.

4 MR. FREIDIN: There are separate  
5 statements to support Panel 1, 2 and 3.

6 MR. IRWIN: No, there's two statements,  
7 statement 4 and statement 5.

8 MADAM CHAIR: And you have nine witnesses  
9 to speak to that. So you think that we could hear your  
10 witnesses in--

11 MR. IRWIN: Two mornings.

12 MADAM CHAIR: --in two days.

13 MR. IRWIN: Yes. If we start at nine we  
14 can be finished at noon with our evidence-in-chief,  
15 probably noon the next day in our evidence-in-chief on  
16 the balance.

17 MADAM CHAIR: Are you suggesting that the  
18 cross-examination of some part of the evidence begins  
19 before all your examination-in-chief is in?

20 MR. IRWIN: It might make it a little bit  
21 more coherent to do it that way because these are  
22 different aspects. The first two are non-native  
23 modelers and the other two --

24 MADAM CHAIR: And they're speaking  
25 specifically to what is Panel 5 right now.



1                   MR. IRWIN: Like one -- yes, one is  
2 coming from a different perspective. One is coming  
3 from a former government employee and as a former  
4 director, the next two are native consultants who are  
5 experts also.

6                   And it might make it a little better if  
7 the cross-examination is split up. I'm in the hands of  
8 the Board and the other parties. I can do it all or I  
9 can put all nine in or I can split it up.

10                  MADAM CHAIR: Okay. Thank you, Mr.  
11 Irwin.

12                  MR. MARTEL: It's just that you will have  
13 to indicate to the Board where you want to split after  
14 your Panel 1 group, and at what stage, because you then  
15 have -- you say, two mornings. You've got three  
16 panels.

17                  MR. IRWIN: I don't imagine there will be  
18 a lot of cross-examination of the third panel because  
19 much of this evidence is similar to what you've heard  
20 in Thunder Bay. The only added increment is these are  
21 the people that established what their rights were, now  
22 how they went out and tried to work within their  
23 community. These are non-natives, non-natives.

24                  MADAM CHAIR: Just one thing, Mr.  
25 Freidin.

1                   Mr. Irwin, when we show up for the first  
2                   day of your evidence, will you be leading your  
3                   witnesses in this order?

4                   MR. IRWIN: Yes.

5                   MADAM CHAIR: So you will begin with Mr.  
6                   Aiken and Mr. Dolcetti and they will be speaking  
7                   specifically to the Panel 5 evidence.

8                   MR. IRWIN: Right.

9                   MADAM CHAIR: And Messrs Nothing and  
10                  Elliott will be speaking also to --

11                  MR. IRWIN: Panel 5.

12                  MADAM CHAIR: And the lay witnesses, five  
13                  of them, will be speaking to some parts of Panel 4.

14                  MR. IRWIN: Yes. Hector King is  
15                  mentioned in Panel 4 and working with others in Panel 5  
16                  proposal.

17                  MADAM CHAIR: All right. Mr. Freidin?

18                  MR. FREIDIN: That causes me to ask  
19                  whether there is any indication in any -- in either of  
20                  those two witness statements what the substance of the  
21                  evidence of Messrs. Michon, MacGuire and Simmons will  
22                  be.

23                  You recall that Michon and one of the  
24                  MacGuires testified in Panel 2 about specific impacts  
25                  of timber management on traditional pursuits, whether

1 hunting, fishing trapping.

2 Is that the nature of -- I mean, there's  
3 nothing of that sort of thing in Panel No. 4. Hector  
4 King was going to be a witness. I'm just having some  
5 confusion as to what those gentlemen are going to  
6 testify to and I want to be clear. If they're going to  
7 talk about something quite different than what's  
8 contained in witness statement 4, it would be more like  
9 what's in Panel No. 2, or are they going to be putting  
10 evidence or something more they want to say in that  
11 regard?

12 MR. IRWIN: They took the model and  
13 brought it to the communities. They will be addressing  
14 that and they will be addressing the working together  
15 section in 5.

16 MR. FREIDIN: All right. So there's no  
17 written description of what happened when they took it  
18 to the communities, but you want them to say they took  
19 this model, they took it to certain communities and got  
20 some sort of feedback; is that the idea?

21 MR. IRWIN: Basically.

22 MR. FREIDIN: And do you know -- can you  
23 advise us now which communities they in fact went to  
24 that we will be hearing about, like which communities  
25 in fact responded.

1                   MR. IRWIN: Can I do that in writing to  
2                   you?

3                   MR. FREIDIN: Well, it might -- you can  
4                   do that in writing, I suppose, but I would like that as  
5                   soon as possible.

6                   MADAM CHAIR: Yes. What we would have  
7                   done, as you know, Mr. Irwin, normally we would have  
8                   had a scoping session and we would have talked about  
9                   these matters and then there would have been some  
10                  opportunity for the parties to get some questions  
11                  answered in order to prepare for cross-examining your  
12                  witnesses.

13                  Ms. Gillespie?

14                  MS. GILLESPIE: Madam Chair, it's also my  
15                  recollection that that in Thunder Bay there was some  
16                  reservation of cross-examination from one of the  
17                  earlier panels based on the fact that Panel 4 was going  
18                  to be called later. I have not reviewed the transcript  
19                  today --

20                  MADAM CHAIR: Yes, that's right, Mr.  
21                  Freidin was involved in that.

22                  MS. GILLESPIE: I believe that the  
23                  Ministry of the Enviroment was, and I think the  
24                  Industry may have been as well, so that needs to be  
25                  reviewed and discussed with Mr. Irwin because there was



1       some undertaking I think about who was going to return  
2       for Panel 4.

3                   MADAM CHAIR: That's right. The Board  
4       then will ask the parties to get in touch with Mr.  
5       Irwin and to tell him what undertaking was given by his  
6       client at that time. And hopefully all these  
7       outstanding matters can be taken care of in this last  
8       piece of evidence.

9                   Presumably this can be done by telephone  
10      and by mail. Yes, we won't be meeting again before we  
11      hear Mr. Irwin's evidence.

12                  MR. FREIDIN: So if I might then just  
13      clarify that Mr. Irwin will be advising us in writing  
14      which communities in fact were consulted in relation to  
15      this draft model, and perhaps at the same time, Mr.  
16      Irwin, you can advise specifically who within that  
17      community was spoken to.

18                  MR. IRWIN: I think --

19                  MR. FREIDIN: Is that satisfactory?

20                  MR. IRWIN: I think it's in working  
21      together. If I recall, the agreement working together  
22      mentions Jellicoe, Macdiarmid --

23                  MADAM CHAIR: You mentioned five or six  
24      communities.

25                  MR. IRWIN: Nipising. One of the Chiefs,

1       there's only two reserves in there, I don't know -- I  
2       mean, I'll check. I don't know if I can add much more  
3       than that.

4                       It's not a very big area in terms of  
5       municipalities, there's only one municipality within  
6       the area and one outside the area.

7                       But if there's anything beyond that I'll  
8       let Mr. Freidin know. I'll let him know anyway.

9                       MADAM CHAIR: Thank you, Mr. Irwin.

10                      MR. FREIDIN: Sorry, another matter that  
11       may require clarification and that is whether, in fact,  
12       the group which is now presenting these witness panels  
13       is different than the group that presented the original  
14       set of panels. This is the Eastern Lake Nipigon  
15       Community, that wasn't the description that was given  
16       when we cross-examined on Panel 1 and 2 as to who OMAA  
17       was, who was involved in the communities, which  
18       communities there were. We may ask some questions as  
19       to, clarification as to whether there's any  
20       distinction. You don't need to answer it now.

21                      MR. IRWIN: I can answer now. It's  
22       broader. It started off as Macdiarmid, Beardmore, we  
23       now go north to Jellico and halfway across Eastern Lake  
24       Nipigon and further south. So it's a broader community  
25       now than originally stated.

1 MR. FREIDIN: We may cross-examine on  
2 that. That's all.

3 MADAM CHAIR: All right. Well, so that  
4 there won't be any more obstacles to hearing this  
5 evidence and things will go smoothly once we reconvene  
6 on--

7 MR. BERAM: March 30th.

8 MADAM CHAIR: --on March 30th, the Board  
9 really would like all the parties and Mr. Irwin to sort  
10 out anything, any other outstanding matters and, again,  
11 Mr. Irwin, it's incumbent on the counsel who will be  
12 leading the evidence to respond to the questions the  
13 panels have. That's what our scoping sessions are  
14 about, so there are no surprises and everyone is  
15 prepared to get through the evidence pretty quickly.

16 MR. IRWIN: Madam Chair, just as I'm  
17 getting to learn the rules it's the end of our  
18 evidence. We won't be back after. It's taken me six  
19 months to learn how the process plays out. Thank you.

20 MADAM CHAIR: Anything else, Mr. Freidin?

21 MR. FREIDIN: No.

22 MR. MARTEL: You're lucky it's only six  
23 months.

24 MADAM CHAIR: Any other questions?

25 (no response)

1 All right. We're finished today and we  
2 will be back on March the --

3 MR. PASCOE: 30th.

4 MADAM CHAIR: Is that Monday morning?

5 MR. PASCOE: Yes.

6 MADAM CHAIR: We don't start until 10:30  
7 Monday mornings, Mr. Irwin.

8 Thank you very much.

9  
10 ---Whereupon the hearing was adjourned at 2:30 p.m., to  
11 be reconvened on Monday, March 30th, 1992,  
12 commencing at 10:30 a.m.

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